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Supreme Court, U.S.
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No. 95-499

In The

Supreme Court of the United States

October Term, 1995

JAMES CLELAND,

Petitioner,

vs.

CITY OF BURLINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Washington State Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do the implied consent warnings that Washington State law mandates be given to DWI suspects before the administration of a breath alcohol test, impermissibly interfere with a defendant's ability to obtain exculpatory evidence?

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STATEMENT OF THE CASE

The petitioner, an attorney licensed to practice in the State of Washington, was cited into Burlington Municipal Court on August 14, 1991 for Driving While Intoxicated (DWI). He was given the opportunity to have his breath tested for alcohol content by the BAC Verifier DataMaster.[1] He gave two samples. The result of the first sample was .14 grams of alcohol per 210 liters of breath and the second sample was .15 grams of alcohol per 210 liters of breath.[2]

Prior to submitting to the test the arresting officer read Mr. Cleland the implied consent[3] warning per Washington State

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1. The BAC Verifier DataMaster, approved by the Washington State Toxicologist per state statute, operates on the principle of infrared spectroscopy. WAC (Washington Administrative Code) 448-12-210 through 448-12-340, RCW 46.61.506(3). *State v. Ford,* 110 Wash. 2d 827, 829, 755 P.2d 806 (1988).

2. Under Washington state law a person is guilty of driving under the influence of alcohol if the person drives a vehicle with a breath alcohol concentration of 0.10 grams of alcohol (or higher) per two hundred ten liters of breath. RCW 46.61.502, RCW 46.61.506.

3. Any person who operates a motor vehicle within the state of Washington is deemed to have given consent to a test of his or her breath or blood for the purpose of determining alcohol content if arrested for any offense where the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor. RCW 46.20.308(I). However "[t]he officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver that (a) his or her privilege to drive will be revoked or denied if he or she refused to submit to the test, and (b) that his or her refusal to take the test may be used in a criminal trial." RCW 46.20.308(2).

Initiative 242 and RCW 46.20.308. The warnings were read to the petitioner as follows:

> Warning: You are under arrest for driving a motor vehicle while under the influence of intoxicating liquor. Further, you are now being asked to submit to a test of your breath which consists of two separate samples of your breath, taken independently to determine alcohol content. You are now advised that you have the right to refuse this breath test; but if you refuse, your privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by a qualified person of your own choosing and that your refusal to take the test may be used in a criminal trial.[4]

The petitioner signed a copy of the warning stating that "I have read or have had read to me the above statement."

A motion to suppress the DataMaster breath test results based on the implied consent warning was made at the municipal court level. The petitioner framed the issue as follows:

> Were the implied consent warnings read to the defendant sufficient to inform him of his

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4. The refusal of a person to submit to a test of the alcoholic content of the person's breath is admissible into evidence at a subsequent trial. RCW 46.61.517.

> right to have an additional test of bodily substance other than breath?

The motion to suppress was denied and the petitioner was found guilty by stipulated trial on June 26, 1992.

The Superior Court of Skagit County, Washington affirmed the petitioner's conviction on his first direct appeal.

Division I of the Washington State Court of Appeals accepted the case on discretionary review framing the issue as follows:

> Did the failure to provide implied consent warnings in the precise language of RCW 46.20.308 regarding the right to additional tests preclude the admission of the breath test results?

A unanimous court answered that question in the negative and affirmed Cleland's conviction in an unpublished opinion on December 27, 1994. (The opinion is included in Cleland's Petition for Writ of Certiorari at p. 23.)

The Washington State Supreme Court denied discretionary review on May 10, 1995.

REASONS FOR DENYING THE WRIT

After being arrested for DWI but before having his breath tested for alcohol the petitioner was given the following warning:

> You are under arrest for driving a motor vehicle while under the influence of intoxicating liquor. Further, you are now

> being asked to submit to a test of your ***breath*** which consists of two separate samples of your ***breath***, taken independently to determine alcohol content. You are now advised that you have the right to refuse this ***breath*** test; but if you refuse, your privilege to drive will be revoked or denied by the Department of Licensing; and that you have the right to additional tests administered by a qualified person of your own choosing and that your refusal to take the test may be used in a criminal trial.

(Emphasis added).

He claims that because the only test mentioned in the warning is the breath test he was misled into believing that the breath test was the only "additional test" available. Presumably, although Cleland doesn't make the claim, if he had known that other tests were available he would have obtained them and proved his innocence. But since he was thus misled into believing he may obtain only a breath test and "[t]here are no "Datamasters" in the hands of private persons"[5] (Petition at p. 17) he missed his opportunity to obtain a different test of intoxication — a blood test, for example — and the evidence dissipated with the passage of time.

Thus, according to Cleland, the City failed to preserve exculpatory evidence by not explaining that the term "additional tests" includes a plethora of possible tests of intoxication including a blood test.

To accept Cleland's position, one must conclude that

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5. This allegation is unsupported by the record.

Cleland, an attorney licensed to practice in the State of Washington, was incapable of understanding the meaning of simple language and that somehow the use of the words "additional tests" limited the type of available tests and thus precluded him from making an intelligent decision whether to exercise his statutory right of refusal under RCW 46.20.308.

Cleland's argument requires that one read each sentence of the Implied Consent Form without regard to the other sentences therein.

In sentence two of the form, it states:

> You are now being asked to submit to a test of your *breath* which consists of two *separate* samples of your breath taken independently to determine the alcohol content.

(Emphasis added)

The second sentence of the Implied Consent Form limited the type and number of tests the City could require of Cleland. The last sentence of the form, "you have the right to additional tests . . ." set no limitation on the type of tests nor on the number of tests Cleland could undertake on his own.

The Implied Consent Warning Form mentions a breath test and additional tests, one being singular and the other being plural, implying there are other types of tests that could be given.

A. Due Process

The petitioner's due process argument relies solely on *California v. Trombetta*, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). There this Court again considered the question of

"access to evidence" guaranteed by the Due Process Clause of the Fourteenth Amendment. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 73 L. Ed. 2d 1193, 102 S. Ct. 3440 (1982); *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

Trombetta asked the question of whether the Due Process Clause of the United States Constitution[6] requires law enforcement to preserve breath samples of suspected drunk drivers.

Writing for a unanimous court Justice Marshall replied in the negative. Initially he found that law enforcement acted in accord with their normal practices and in good faith, quoting *Killian v. United States*, 368 U.S. 231, 7 L. Ed. 2d 256, 82 S. Ct. 302 (1961):

> ". . . if, [the evidence was] destroyed by the agents in good faith and in good accord with their normal practices, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right."

Id. at 242, 7 L. Ed. 2d 256, 82 S. Ct. 302.

California v. Trombetta, *supra* at 487, 81 L. Ed. at 421. Cleland has shown no evidence that law enforcement did not act in good faith and in good accord with their normal practices.

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6. The Washington State Supreme Court has recently decided that in the context of preservation of evidence the Due Process Clause of the Washington State Constitution, Article 1 Section 3, does not afford greater protection than its counterpart in the United States Constitution. *State v. Wittenbarger*, 124 Wash. 2d 467, 481, 880 P.2d 517, 524 (1994).

B. Materiality

The evidence which Cleland complains the police failed to preserve does not meet the "standard of constitutional materiality." Evidence is constitutionally material if it had an apparent exculpatory value before destruction and if the defendant is unable to get comparable evidence by other reasonably available means. *Trombetta* at 489. After reviewing the testing procedures of the intoxilyzer used by the California Department of Health the Court in *Trombetta* concluded the breath samples were not material:

> Once the intoxilyzer indicated that the respondents were legally drunk breath samples were much more likely to provide inculpatory then exculpatory evidence.

Id. at 489.

As in *Trombetta*, the chance is extremely remote that if Cleland obtained a blood test it would have been exculpatory. The Washington State Toxicologist has the delegated authority to draft breath testing procedures and protocols. RCW 46.61.506. Pursuant to this authority the state toxicologist approved the BAC Verifier DataMaster, a device that uses infrared spectroscopy for breath alcohol analysis. Infrared[7] alcohol analysis is widely accepted in the scientific community. To protect suspects against machine malfunction the toxicologist has developed test procedures that include: (1) the operator must

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7. *See State v. Crea*, 806 P.2d 445 (Idaho 1991) noting wide scientific acceptance of another infrared machine, the Intoximeter; *State v. Velasco*, 799 P.2d 821 (Ariz. 1990) noting the self-checking capabilities and regulatory safeguards make the Intoxilyzer, yet another infrared machine, extremely accurate.

observe the subject for fifteen minutes before the test and check his or her mouth for substances that might affect the test; (2) the subject must provide two valid breath samples, the results of which must be within 10% of the mean of the two samples; (3) the subject samples are bracketed by four "blank" tests of ambient air in the breath testing chamber that must result in a zero reading; (4) between each subject sample the machine tests the gas overlying a simulator solution. The simulator solution is a mixture of 90% water and 10% alcohol. The gas overlying that solution "simulates" breath alcohol. The result of the test of the simulator solution must be between .090 and .110 inclusive. WAC 448-13-040, 050 and 070.[8]

Technicians trained and certified by the state toxicologist perform periodic quality assurance that includes re-calibration and checks of each component and function of every BAC Verifier DataMaster instrument used by the State of Washington. WAC 448-13-110, 130. The state toxicologist certifies instructors to train operators. Only those persons who are competent and qualified to administer breath test for alcohol concentration using the BAC Verifier DataMaster are certified as operators. WAC 448-13-15.

Thus a dispassionate review of DataMaster and the Washington testing procedures here indicates that even if Cleland had obtained a blood test the chances are extremely low that it would have been exculpatory or even play a significant role in his defense. *Id.* at 488.

Turning to the second part of the materiality analysis, Cleland had alternative means with which to impeach the breath

8. The simulator solution is prepared by the forensic toxicology staff under the supervision of the state toxicologist. WAC 448-13-080. After mixing the solution according to the authorized protocol it is tested by gas chromatography. WAC 448-13-080.

test results. He had access to the protocols, regulations, breath test ticket, and the qualifications of the operator.[9] He could have used any of this information to attack the validity of the breath test.

A defendant may also impeach the accuracy of the DataMaster with expert testimony. Expert testimony might explore the validity of the physical, chemical or mathematical principles employed by the DataMaster. Similarly, testimony regarding the effect of physiological variations on DataMaster readings may be relevant.

C. Bad Faith

Finally, in *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988), Chief Justice Rehnquist, writing for the majority, ruled that unless a criminal defendant can show bad faith by the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

The record does not reflect nor does Cleland allege bad faith.

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9. All documents used by the state toxicologist and his personnel are available to the defense upon request. These documents include the breath test document, the simulator solution preparation protocol, the alcohol analysis protocol, the certification document for simulator solution, the affidavit from the analyst of simulator solution, the quality assurance protocol, the quality assurance procedure report, the affidavit concerning quality assurance procedure, the operator course outline, the operator refresher course outline and the operator training record. WAC 448-13-130, WAC 448-13-200.

CONCLUSION

Based upon all of the foregoing authorities this Court should deny Cleland's petition for writ of certiorari.

Respectfully submitted,

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